

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA

4 v.

09 Cr. 581 (WHP)

5 DONNA M. GUERIN,

Sentence

6 Defendant.

7 -----x
8 New York, N.Y.
9 March 1, 2013
2:00 p.m.

10 Before:

11 HON. WILLIAM H. PAULEY III

12 District Judge

13 APPEARANCES

14 PREET BHARARA

15 United States Attorney for the
16 Southern District of New York

17 STANLEY J. OKULA

18 NANETTE DAVIS

JASON P. HERNANDEZ

Assistant United States Attorney

19 MARK ROTERT

20 Attorney for Defendant

21 CHRISTINE MAZZELLA

22 Special Agent - IRS
23
24
25

1 (Case called)

2 THE CLERK: Appearances for the government.

3 MR. OKULA: Good afternoon, your Honor. Stanley Okula
4 and Nanette Davis and Jason Hernandez for the government.
5 Seated at counsel table is Special Agent Mazzella from the IRS,
6 with whom I believe your Honor is familiar.

7 THE COURT: Good afternoon.

8 THE CLERK: Appearance for the defendant?

9 MR. ROTERT: Good afternoon, your Honor. Mark Rotert
10 here for the defendant Donna Guerin, who is present here in
11 open court.

12 THE COURT: Good afternoon, Mr. Rotert. I note the
13 presence of Ms. Guerin at counsel table.

14 This matter is on for sentencing. Are the parties
15 ready to proceed?

16 MR. OKULA: We are, your Honor.

17 MR. ROTERT: Yes, your Honor.

18 THE COURT: Mr. Rotert, have you reviewed with your
19 client the pre-sentence investigation report?

20 MR. ROTERT: I have, your Honor.

21 THE COURT: Are there any factual matters set forth in
22 the report that you believe warrant modification or correction?

23 MR. ROTERT: Yes, your Honor. If I may approach the
24 podium, your Honor?

25 THE COURT: You may.

1 MR. ROTERT: Your Honor, I'm sure the Court has a copy
2 of the revised pre-sentence investigation report. If I could
3 direct the Court's attention to page 28 of that document, sir.
4 Your Honor, page 28 has a paragraph 95 that is captioned as
5 "Financial Condition: Able to pay."

6 THE COURT: Yes.

7 MR. ROTERT: I'd like to offer a couple of corrections
8 to this report that I think are a product of trying to fill out
9 forms and communicate correctly in a moving environment.

10 On the listing of assets for Ms. Guerin, you will see
11 under "Transfer of assets," I think it is about the fifth entry
12 down, it says various pieces of fine jewelry and it values them
13 at \$65,500.

14 THE COURT: I see that.

15 MR. ROTERT: Your Honor, that jewelry was sold by Ms.
16 Guerin. She no longer owns it. The proceeds of that actually
17 make up a part of the bank account at the top for Suburban Bank
18 & Trust, the \$117,000 amount. That \$117,000 amount includes
19 proceeds from the sale of that jewelry, but the jewelry is no
20 longer an asset of hers. I would request that we back out that
21 \$65,500 figure.

22 THE COURT: Any objection to that?

23 MR. OKULA: None at all, your Honor.

24 THE COURT: I'm striking the line "transfer of assets"
25 and will subtract that from the total assets. Have you done

1 the math?

2 MR. ROTERT: I haven't, your Honor, because I'm not
3 quite done with the adjustments.

4 THE COURT: All right.

5 MR. ROTERT: Your Honor, I would also indicate for the
6 second and third entries under Ms. Guerin's assets, the IRAs,
7 those certainly are assets Ms. Guerin possesses. But as I am
8 sure you are aware, until she reaches the age of 59½, those
9 would not be accessible at their face value. There would be
10 tax penalties associated with any effort to cash those in such
11 that for purposes of what is an available asset to her today,
12 the number is about \$230,000 as opposed to the aggregate sums
13 there. Your Honor, by virtue of my modest abilities to do
14 math, I believe that Ms. Guerin's net worth right now is a net
15 worth of negative \$122,000, approximately.

16 THE COURT: Does the government have any reason to
17 dispute that?

18 MR. OKULA: We don't, your Honor. We recognize, and I
19 think Mr. Rotert is entirely right, that the face value is
20 premised on the notion of immediate access and that the IRA
21 rules do envision reaching the appropriate age to get that face
22 value. So we have no problem with the adjustment of the
23 numbers as Mr. Rotert suggests.

24 THE COURT: Very well.

25 MR. ROTERT: Your Honor, if I can then direct the

1 Court's attention to the next page of the pre-sentence report,
2 paragraph 97. The Court will see that the report lists the
3 assets held by Tom Guerin, Ms. Guerin's husband. That first
4 line there for bank accounts, your Honor, the proceeds of the
5 sale of Ms. Guerin's home were in that bank account at the time
6 that figure was set forth.

7 As the Court I'm sure is aware, those proceeds now
8 have been disbursed to the government in connection with the
9 forfeiture agreement that Ms. Guerin reached as part of her
10 plea agreement. The actual net worth total for Mr. Guerin
11 right now is approximately \$1,272,000, and the difference
12 relates to the expenditure that was made for purposes of
13 securing the forfeiture amount.

14 I would also like to note for the Court and for the
15 record that prior to the proceedings beginning this afternoon,
16 I did tender to government counsel a bank check issued by Ms.
17 Guerin for \$1.6 million in satisfaction of the agreement she
18 reached as to forfeiture.

19 THE COURT: All right.

20 MR. ROTERT: Your Honor, I have no other suggested
21 requests or corrections to the pre-sentence investigation
22 report.

23 THE COURT: Before you sit down, I have a question.
24 There were substantial transfers of funds to a trust set up in
25 the name of Ms. Guerin's husband.

1 MR. ROTERT: Yes, your Honor.

2 THE COURT: Where is that money?

3 MR. ROTERT: Your Honor, the money that was in the
4 trust has been used for their residence, including the
5 acquisition of a side lot, for improvements to their residence.
6 A significant amount of money was spent on the legal fees and
7 costs associated with this prosecution. But Mr. Guerin's net
8 worth, including the trust assets, is as correctly noted now
9 after my corrections on the pre-sentence investigation report.

10 THE COURT: There were millions of dollars in the
11 trust.

12 MR. ROTERT: Your Honor, as you know, roughly
13 \$8 million of the total received by Ms. Guerin was paid in
14 taxes.

15 THE COURT: Right. But she received \$18 million.

16 MR. ROTERT: Right. Your Honor, the balance of the
17 money was used for the various expenses and costs that I have
18 noted with respect to her personal home, with respect to her
19 legal fees and expenses, and that money is just the money that
20 they have been living on. I don't know which specific amounts
21 or which specific transfers the Court is focused upon. I'm not
22 sure if I'm answering the Court's question.

23 THE COURT: I'd just like a 30,000-foot flyover. What
24 happened to \$10 million when I'm told that she's living so
25 modestly? She didn't spend \$10 million on a house and

maintaining it in Illinois.

MR. ROTERT: There was a lot of money put into the house that never came back in the sale that was transacted.

THE COURT: How much?

MR. ROTERT: I'll see if I can give it to you.

THE COURT: Thank you.

MR. ROTERT: Your Honor, it's an amalgam of various things, but let me give you some examples. Ms. Guerin and her husband have been paying for the medical care and the assisted living of Ms. Guerin's mother. They have also had substantial medical expenses for another relative of Mr. Guerin that they have absorbed. Ms. Guerin herself, as the pre-sentence report indicates, underwent a very extensive and very expensive series of medical treatments both in vitro fertilization efforts and a hysterectomy, so she had some very, very substantial medical expenses over this period of time.

Judge, there were some assets, a substantial number of assets, that were acquired but then had to be auctioned off for purposes of meeting the financial obligations here. For example, she got about \$65,000 worth of cash income from the sale of jewelry that was 4 or \$500,000 of expenditure.

They purchased some artworks on the belief that the value of those artworks would appreciate. They spent 6 figures to obtain artworks. When they sold them for purposes of gathering their assets together, they didn't get anywhere close

1 their amount of money back. And they took a beating in
2 investments at the same time that the rest of us took a beating
3 in our investments.

4 Your Honor, Mr. Guerin's trust was the subject of
5 grand jury subpoenas from the government. There is nothing
6 that is secret about the financial activities of the defendant.
7 Before we reached agreement on the forfeiture amount, we
8 supplied the government with financial information so that they
9 could have a real-time picture into what the situation was with
10 respect to her financial state.

11 The report, the pre-sentence investigation report as
12 corrected, is a correct rendition of her circumstances now, and
13 the expenditures that have been taking place were expenditures
14 for family, for medical, for personal use, and for the
15 residence.

16 THE COURT: I'll ask the government whether the
17 government is satisfied with the accounting. It's difficult
18 for this Court to accept that since 2003 \$10 million has
19 vaporized into the ether. That's just my rough math. Mr.
20 Okula?

21 MR. OKULA: Your Honor, we did make the inquiry of
22 counsel. We do see the numbers that your Honor is seeing. I
23 think one slight adjustment to give Mr. Rotert sort of credit
24 for the argument that he is making is the \$10 million sort of
25 plus position I think goes back to the '98 period, so it goes

1 from '98 to 2003, so the cost of living expenses over that time
2 frame.

3 We, truth be told, were at a loss a little bit over
4 the overall accounting. That's why we did issue grand jury
5 subpoenas, we did inquire about the trust. There is a number
6 of millions of dollars that came out of the trust that we
7 haven't been able to trace.

8 THE COURT: Like \$3.2 million on February 18, 2004,
9 correct?

10 MR. OKULA: Correct, your Honor. It ended up to be
11 something that we simply couldn't track down at the end of the
12 day, your Honor. We don't have any information that can
13 positively gainsay anything about the numbers, but we share the
14 Court's sort of puzzlement about where the money went.

15 MR. ROTERT: Your Honor, I think it is correct, as Mr.
16 Okula helpfully notes, that these numbers, as far as I can
17 tell, actually go back to 1997. The \$3 million on February 18,
18 2004, was a transfer from the trust to the accounts of the
19 Guerins.

20 THE COURT: When you say that was a transfer to the
21 accounts of the Guerins, the day before, on February 17,
22 \$517,876.21 were transferred to Mr. Guerin's Bank One account.
23 That was another transfer to the Guerins. And on October 1,
24 2003, just a few months earlier, a million dollars went
25 someplace, the government says unknown. Those are rather high

1 living expenses.

2 MR. ROTERT: Your Honor, the expenses associated with
3 this litigation, which essentially started to heat up in 2003,
4 have been pretty significant. They were in any event having to
5 liquidate their assets. They were taking a beating in the
6 economy at the time. They weren't getting back the dollars
7 that they had invested in.

8 Judge, let me say this. I don't think anyone
9 believes, and I hope the Court doesn't consider, that there are
10 any hidden assets or any assets that are not accounted for that
11 are still in the possession or control of the defendant.

12 THE COURT: I get paid to be skeptical, Mr. Rotert.
13 That's the nature of the job of a district judge. When I'm
14 presented with a case that involves fraud, I'm extra skeptical.

15 MR. ROTERT: I appreciate that, your Honor. One thing
16 I think the Court need not be skeptical about, and that is the
17 ability of the government team here, as assisted by their
18 agents, to follow the money. I think it is a fairly safe
19 matter for the Court to take comfort in that if there were any
20 indication that this money was being squirreled away and kept
21 from the visibility of the Court, it would have been determined
22 by Ms. Mazzella and the other people working for the
23 government.

24 I appreciate that the Court thinks that there have
25 been significant expenditures, and I understand the Court's

1 concern, but I do want to say that there were a lot of moneys
2 that just were lost because of the economy and then had to be
3 spent on other matters, such as litigation costs and medical
4 costs and improvements and things that they were doing in their
5 residence. This is the money that they used in those fashions.

6 I'm not in a position to itemize this money, Judge,
7 but it really is not a situation where Ms. Guerin is sitting on
8 a secret stash or, for that matter, Mr. Guerin. And I know
9 that the government has carefully investigated their financial
10 situation.

11 THE COURT: Anything further on the pre-sentence
12 report?

13 MR. ROTERT: Not on the PSR, your Honor.

14 THE COURT: Mr. Okula, does the government believe
15 that there are any matters that warrant modification or
16 correction in the pre-sentence report?

17 MR. OKULA: We do not, your Honor.

18 THE COURT: I have considered the parties' submissions
19 to me. Mr. Rotert, do you wish to be heard on behalf of Ms.
20 Guerin?

21 MR. ROTERT: May I please, your Honor?

22 THE COURT: You may.

23 MR. ROTERT: Your Honor, I would like to talk about
24 the two facets of a sentencing proceeding that are most
25 prominent in everyone's mind, and those relate to the financial

penalties and then to the sentence itself. If the Court please, I would like to do the financial side of it first.

THE COURT: You may.

MR. ROTERT: Your Honor, the United States on Wednesday sent me a group of materials that they also presented to the Court in which they urged that Ms. Guerin should be subject to a restitutionary order in this case. I don't know if I have the exact last number, but I know that it is in the realm of 180-plus million dollars. Your Honor, I want to address that because I think that that is an amount that, while I don't challenge the arithmetic used to reach it, I think an order of restitution in this case as to Ms. Guerin under the circumstances is neither necessary nor appropriate. I'll say that for this reason.

THE COURT: If I could interrupt for one second.

MR. ROTERT: Yes.

THE COURT: The latest information, as I understand it, from the government is that the government asserts that with interest, restitution in the amount of \$190,355,836 is due. Is that the submission that you received?

MR. ROTERT: Your Honor, Wednesday afternoon at 3:15 they sent me a group of materials that had the number \$189,276,000.

THE COURT: Mr. Okula, which figure is correct?

MR. OKULA: Your Honor, with the additional interest

1 computation that the Court asked for, the correct figure is
2 \$190,355,836. I think the previous submission was a million or
3 two less than that, but we updated the numbers to include the
4 additional interest that had accrued for the last period that
5 was covered, which ended December 31, 2012, and is current to
6 today. So it is the \$190 million figure, your Honor.

7 THE COURT: Thank you.

8 MR. ROTERT: The letters or the materials that they
9 filed with the Court a week ago today had the number at
10 92 million. So it's gone up by a hundred million dollars over
11 the space of several days.

12 THE COURT: The government tries to get it correct
13 when we finally get down to sentencing, I guess.

14 MR. ROTERT: I'm not convinced that they have gotten
15 it correct, your Honor. But the reality is there is I don't
16 think anyone in this room who believes that Ms. Guerin could
17 make restitution payments in anything close to that amount.

18 The primary concern I want to address to the Court is
19 this. If anything is apparent from all of the submissions and
20 all of the information known to the Court, it is that this was
21 a case that involved an extremely large number of conspirators,
22 both indicted and unindicted. It involved lawyers, it involved
23 bankers, it involved financial advisers and accountants. It
24 involved taxpayers. They are literally spread all over the
25 country.

1 The proposition that in this hearing this afternoon
2 the Court could reach a reliable determination about these
3 numbers, and especially these numbers that have been coming in
4 over the course of the last few days, I think is neither fair
5 to the Court nor consistent with what the statute calls upon us
6 to do. I think it was for this reason, Judge, that Judge
7 Kaplan, at the conclusion of the KPMG case, made the
8 determination -- for the Court's benefit, if it is helpful, I
9 brought a copy of the order that Judge Kaplan issued in which
10 he determined that under the statute, as the restitution
11 statute expressly provides, it really wasn't possible, because
12 of the complication and prolongation of the sentencing process
13 that would be required, to fashion individual sentences of
14 restitution.

15 The same thing happened in the E&Y case, your Honor,
16 where multiple defendants were convicted on charges that,
17 although they involved different tax strategies, were in many
18 fundamental respects indistinguishable from the charges in this
19 case, and no restitution was ordered in that case either. I
20 will indicate to the Court that in both KPMG and in the E&Y
21 case no forfeitures were sought.

22 I would submit to the Court that in a case such as
23 this, where Ms. Guerin has reached agreement with the
24 government about a forfeiture amount, an agreement reached
25 after the government was privy to her financial situation and

her financial statements, and where the defendant has made that \$1.6 million forfeiture payment today, adding an additional restitutionary obligation, and particularly one with the gargantuan numbers that the government has put before you, I don't know that we can reach a reliable determination that those numbers are correct. And even if we reached it, then we would have to make other determinations about the apportionment of that liability.

So, your Honor, I am asking the Court to accept that the plea agreement calls for the payment of \$1.6 million, which has been made, and that the Court not impose an additional order of restitution on Ms. Guerin.

I don't usually like alternative arguments, Judge, but I appreciate that in some circumstances they may be helpful to the Court. I would propose an alternative if the Court is of the view that restitution needs to be ordered. In that regard I'm going to take advantage of one of the citations that the government made to the Court with respect to this very issue.

When I said in my submission that there was too much of a complication and too much of a detailed analysis required to reach a restitutionary order, the Court said, well, another member of the bench here in the Southern District concluded to a different effect when it sentenced another person who was a conspirator in this case, Mr. Kerekes.

I did take a look at the order that that district

1 court entered. I would note, first of all, that he indicated
2 that there was no forfeiture in that case and a fine of -- I
3 can't find it right here -- a \$200 special assessment and a
4 \$50,000 fine. So the economics of that case were somewhat
5 different.

6 The judge said in the course of reaching his
7 determinations, he said, one of the reasons that I want to do
8 this is because the defendant has ample resources to pay any
9 restitutionary order. I don't believe that to be the case with
10 Ms. Guerin.

11 What the judge did with respect to Mr. Kerekes
12 ultimately was a product of his note that allocating
13 restitution on a joint and several basis when there are
14 multiple defendants, some not even at the bar but others in
15 other courtrooms and all over the place, that the better part
16 of it is rather than make a restitutionary obligation a joint
17 and several liability, that what the Court could do under 18
18 U.S. Code section 3664(h) is that it could identify a
19 particular amount that should be paid by a particular defendant
20 as restitution.

21 Your Honor may recall that in the plea agreement
22 reached between the government and Ms. Guerin, the government
23 agreed to apply a policy that the Department of Justice uses in
24 which moneys paid in forfeiture can be applied toward
25 restitutionary obligations. Of course, that is a particularly

appropriate approach to take here because whether we pay it as restitution or whether we pay it as forfeiture, it is essentially heading to the same place.

So, your Honor, in light of the fact that that policy is invoked by the government, I would submit to the Court that if the Court determined that a restitutionary award was absolutely necessary and if the Court disagrees with me that it would be an undue complication and a prolongation of these proceedings -- and we do not wish to prolong these proceedings, Judge -- I would submit that the appropriate thing is to make a restitutionary award below the \$1.6 million forfeiture amount such that the restitution could be applied from the forfeiture funds. But I do ask the Court not to impose an additional burden on Ms. Guerin for restitutionary payments in addition to the forfeiture sum that she has paid.

THE COURT: Before you turn to the balance of your arguments, I'd like to hear from the government on the restitution issue. Thank you, Mr. Rotert.

MR. OKULA: A few points, your Honor. I think the Court endeavored to determine whether counsel objected or quarreled with the restitution amount because if there is an issue regarding the reliability of the numbers, there are alternatives that the Court has. I understood counsel to say at the outset that they were not questioning the amount, yet Mr. Rotert got up here and used the word "unreliable" on a

number of occasions. He can't have it both ways, your Honor.

The numbers were the product of an extensive analysis that we did. It is for a universe of taxpayers who evaded audit and therefore there are losses that are due and owing to the government as a result. We had a team of revenue agents do the precise calculations. They calculated them conservatively, and those are the numbers embodied. So, your Honor, I don't think there is a real, genuine dispute that the number we are starting with is \$190 million.

To be sure, this is a complicated case, but it does not necessarily follow that because you have a complicated case and a number of different steps that need to be taken in order to figure out the restitution, that the Court has to automatically conclude that it is too complex. It is not too complex.

Judge Baer didn't find it was too complex. The same methodology we employed in giving Judge Baer the numbers for the BDO-J&G clients, which is sort of a subset of the losses here, led Judge Baer to determine that there was a conservative, fixed number. I think the number he ultimately arrived at was \$60 million for those clients. So, your Honor, we are dealing with a definite number.

We do not contest the fact that the Court has the ability to apportion, and apportion depending upon the consideration of a number of factors: The defendant's

1 financial picture, her role in the conspiracy, and the like.
2 It is true there are many conspirators in this case, so the
3 Court would be perfectly empowered to apportion.

4 But, your Honor, at the end of the day the IRS is out
5 almost \$200 million based on the figures that we presented. It
6 is a figure and a loss suffered directly by the IRS as a result
7 of the defendant's conduct. It was foreseeable to her. Many
8 of those clients were the defendant's own clients. If not, she
9 understood that losses were going to stem from the conspiracy.

10 So, your Honor, there is nothing unfair in the Court
11 determining that there is an apportioned figure that would do
12 justice in this case notwithstanding the fact that there was a
13 forfeiture effected.

14 Remember, forfeiture and restitution are two different
15 things. We have different mechanisms to obtain financial
16 penalties, but the restitution figure is the loss suffered by
17 the IRS, and there is no reason why the Court should not fix a
18 number that could be paid over time.

19 Thank you, Judge.

20 THE COURT: Mr. Rotert, does the defendant contest any
21 of the loss calculations or interest calculations?

22 MR. ROTERT: Your Honor, there certainly are things
23 about the loss calculations that seem to us out of line. For
24 one thing, we believe that the tax rate applied was --

25 THE COURT: Do you want a Fatico hearing?

1 MR. ROTERT: No, Judge, I don't. Your Honor, I don't
2 want to prolong. But I think that to say that the government
3 is out this amount of money -- first of all, the way that some
4 of the taxes were calculated, which I have not, frankly, had a
5 chance to review in great depth since I got them Wednesday
6 afternoon, doesn't seem right. But I don't want to exalt form
7 over substance, Judge.

8 Here is the substance. The substance is that fines
9 and penalties have been imposed in hundreds of millions of
10 dollar amounts on Jenkins & Gilchrist and BDO and Deutsche Bank
11 and others. The fact is that these are taxpayers whose tax
12 returns filed in the year 2000 were filed within a month of
13 Rule 2044 issuing from the IRS. There are complexities with
14 regard to who the defendants are, to what the proportionate
15 role was as to the individuals that are listed here.

16 At the end of the day, Judge, imposing a
17 restitutionary obligation on top of the forfeiture -- and I
18 appreciate Mr. Okula is correct. I understand there is a
19 difference between forfeiture and restitution. The real
20 question is, is it a necessary thing? Will it add to the
21 public fisc? Will it remove a financial harm to the
22 government?

23 The fact is that this is a different case because all
24 of the money goes to the government, whether we label it
25 restitution or label it forfeiture or label it financial

penalty. You heard the testimony at trial. The taxpayers who testified paid back taxes and penalties. The process of developing an economically reliable number of loss here when you consider that all the money goes to the government is more than we should have to bear or that the Court should have to bear.

The question is not whether there are financial losses associated with this or whether or not those losses have been recouped in whole or in part. The real question is, does the Court consider that it's an unavoidable necessity to impose an additional restitutionary obligation above and beyond the forfeiture obligation? I submit to the Court that it is not a necessity, that the defendant has disgorged a significant amount of money today.

If you measure that amount of money against everything she has ever earned, I know what percentage you come up with. But if you measure it against everything she has now, it has been an extremely painful amount of money to come up with. But that's what she's done. Adding another restitutionary obligation won't improve the financial condition of the country. The process of figuring out where the country stands with respect to the dollars in this case would take a much better economist than me.

I don't want to prolong these proceedings, Judge. I want to take this as an approach that is based on the realities

1 of what this defendant is able to do.

2 MR. OKULA: One or two quick points, your Honor. Mr.
3 Rotert keeps slipping into an argument about unreliability,
4 whether it's just given the complexity or given the accuracy of
5 the numbers. I heard him to say at the end of the day he is
6 not contesting the number. That leaves your Honor, in this
7 context where the restitution statute is mandatory, to
8 determine do the discretionary factors that allow apportionment
9 apply to have your Honor fix a smaller figure? Certainly your
10 Honor has that discretion.

11 But reliability is a separate issue from the factors
12 that your Honor should consider for apportionment. Although
13 Mr. Rotert has flip-flopped on this, I think at the end of the
14 day he is not questioning reliability. The numbers are what
15 the numbers are. He mentioned people who settled with the IRS.
16 That has nothing to do with this \$190 million figure.

17 Yes billions of dollars were paid back by the tax
18 shelter clients who decided to settle. These were clients who
19 rolled the dice and said I'm going to wait to see if the IRS
20 catches me or comes after me. To date, your Honor, they stand
21 there with their tax money as a result of the fraudulent
22 shelters that the defendant sold.

23 There is no dispute that the IRS is out that money.
24 The issue is the discretionary factors under apportionment, and
25 that's it, your Honor.

1 THE COURT: Mr. Rotert, one last time for the record,
2 do you contest any of the loss calculations or the interest
3 calculations, the total number? I understand your other
4 argument. The question is, do you contest the total number of
5 \$190,355,836? Please try to answer that question yes or no.

6 MR. ROTERT: No, your Honor.

7 THE COURT: Very well.

8 I am going to rule on the restitution issue right now.
9 Then we can proceed to the other aspects of sentencing.

10 The Mandatory Victim Restitution Act requires the
11 imposition of restitution equal to the amount of actual loss
12 suffered by the victim, here the Internal Revenue Service. See
13 United States v. Carboni, 204 F.3d 39, 47 (2d Cir. 2000). The
14 amount of loss is calculated as of the date of sentencing and
15 includes prejudgment interest. See United States v. Quarashi,
16 634 F.3d 699, 703-04 (2d Cir. 2011).

17 Pursuant to Title 26 of the United States Code section
18 6621 and 6622, the interest is compounded daily at a quarterly
19 determined rate equal to the federal short-term rate plus 3
20 percent. The parties agree that the restitution calculation
21 submitted by the government is mathematically correct. This
22 Court adopts those calculations as its own, and accordingly the
23 total amount of restitution, including prejudgment interest, is
24 \$190,355,836. This Court may "make each defendant liable for
25 payment of the full amount of restitution or may apportion

liability among the defendants." 18 U.S.C. section 3664(h).

Ms. Guerin, in this Court's view, played a central and longstanding role in the conspiracy, and the order of restitution should reflect her culpability. Accordingly, this Court holds that Ms. Guerin is responsible jointly and severally with others for the full amount of restitution in the amount of \$190,355,836. I will include that in the judgment of conviction in this case.

Mr. Rotert, I'm prepared to hear your arguments on behalf of Ms. Guerin.

MR. OKULA: Your Honor, before you do that, may I add one thing that should be included in the judgment as well? Judge Baer did this, and I think it is a matter of fairness to the defendant. To the extent that there are future proceedings against those people who escaped audit, because there is an argument available to the IRS that because fraud was committed, the statute of limitations is open, there could well be proceedings against those taxpayers in the future. So the defendant, to the extent that the IRS makes collections in the future, would be given credit for reduction of her amount for those collected amounts and will endeavor to essentially coordinate with the IRS to make sure that that the math is done.

THE COURT: I'll include that.

MR. ROTERT: Your Honor, may I ask that pursuant to

1 section 3664(f)(3)(B), which reads, "A restitution order may
2 direct the defendant to make nominal periodic payments if the
3 Court finds from the facts on the record that the economic
4 circumstances of the defendant not allow the payment of any
5 amount of restitution order and did not allow for the payment
6 of the full amount of the restitution order in the foreseeable
7 future under any reasonable schedule of payments" -- your
8 Honor, I can't believe that the Court thinks that Ms. Guerin is
9 able to make payment of \$190 million.

10 THE COURT: I am going to put Ms. Guerin on an
11 installment payment schedule at the end of the day based on her
12 income.

13 MR. ROTERT: May I proceed, your Honor?

14 THE COURT: You may.

15 MR. ROTERT: Your Honor, the Court and the parties are
16 all familiar with the language of the provisions of the statute
17 and the Booker debates in the post-Booker world. Judge, I
18 appreciate that there are two prongs that the Court has to keep
19 in mind. First, it has to find a sentence that is sufficient.
20 Second, it has to fashion a sentence that is sufficient but not
21 greater than necessary.

22 The government asks the Court to impose the maximum
23 sentence permitted by the law on Ms. Guerin. I certainly can't
24 argue the sufficiency prong in the sense that if Congress said
25 that the most you can give to someone for an offense is 5

1 years, that must by definition be sufficient, in fact, it must
2 be at the outer edge of sufficiency in the minds of Congress.
3 So I appreciate that the government has asked for that sentence
4 from the Court.

5 The Court knows that I am going to ask the Court to do
6 something significantly different. I ask that because I think
7 that as a matter of faithful application of the standards set
8 forth in 3553(a), it is appropriate to sentence the defendant
9 far below the stipulated guideline range or, as I prefer to
10 call it, the absolute maximum permitted under the law.

11 Your Honor, I know that the Court holds opinions and
12 views like any person would, and especially a professional,
13 about the facts of this case. I know that this case brought to
14 the Court a parade of very wealthy people, very ambitious
15 people, in many instances very greedy people.

16 I know that money and amounts that are frankly well
17 beyond the ken of most of us were thrown around the courtroom
18 as if they were everyday amounts. And I'm sure that as the
19 Court looked over the professionals -- the lawyers and the CPAs
20 and the tax accountants, the bankers -- who engaged in this
21 conspiracy, I'm sure that the Court found that to be extremely
22 distressing and personally distressing.

23 People who try to practice their profession with
24 integrity take it hard if they see others not following in that
25 lead, so I know that subjectively the impulse for the Court is

1 to be harsh, to be stern, to punish.

2 Judge, I suspect that when the Court was confronted
3 with the problems that are familiar to us all with respect to
4 Juror 1 -- the Court had worked so hard, it had read so much,
5 it had put itself through so many extra burdens to be ready for
6 that trial, and then the Court provided an outstanding and fair
7 trial, did everything within its powers and beyond the powers
8 of many to assure a fair trial -- nevertheless, circumstances
9 that none of us could control brought the Court to a very
10 painful place. The Court had to decide whether or not to
11 follow its own impulses, its own wishes. I can't imagine that
12 the Court wishes anything more than not to have to go through
13 that trial again.

14 Weighed against that, the Court had to decide what
15 justice required, what the law counseled, what its conscience
16 directed. I hope the Court will forgive me for making the
17 observation that it was a singular act of courage for the Court
18 to do something that it did not prefer to do because the Court,
19 compelled by the law, felt that it had to do it.

20 I call upon the Court today because of my belief that
21 an analogous situation now obtains. I'm sure that there is a
22 part of the Court that would find it rewarding to impose the
23 maximum sentence, that would find it a culmination of a lot of
24 frustrations to say this person should go away for a decade.
25 But, Judge, I believe, because I have seen in my own

1 experience, that the Court will look past those feelings and
2 past those issues and look to what the statute counsels.

3 What are the nature and characteristics of Donna
4 Guerin? Judge, I was very struck by the writing in the
5 pre-sentence report which I attribute to a government author
6 that Donna Guerin was a junior partner at Jenkins & Gilchrist.
7 She was a partner, or a shareholder as they call them.

8 She definitely was a person with sufficient training
9 and intellect to have made the hard choice not to follow along
10 with the groundswell of people that were heading into this tax
11 shelter business. Nevertheless, I believe that on this
12 evidence and on this record, including everything said in the
13 government's submission, she didn't design these tax shelters,
14 she didn't market these tax shelters.

15 I was noting that the government said that one good
16 example of what went on in this case related to a client named
17 John Martin. The evidence at trial showed that John Martin
18 first came to Ms. Guerin's attention when John Martin's
19 financial adviser and banker sent her an email saying that Mr.
20 Martin wanted to do a tax shelter deal.

21 She implemented it. She did the paperwork. She
22 worked on the opinion letters. There is no question that that
23 is true, because she stood before you on September 13th and
24 admitted to her guilt. And I don't think anyone is challenging
25 that she has acknowledged her guilt and has accepted her

responsibility.

But, Judge, as upsetting as it may have been, as it is today, to look over that panoply of people and firms who were involved in this industry, I can't change the fact that these things took place. But neither can the government change the role that Ms. Guerin played in those events.

Judge, it is easy and I might say predictable for the government to say, you know, Mr. Rotert's argument really boils down to one of those "everybody does it" kinds of an approach. I reject that, Judge. The reason I do is that that is a facile and easy way to label an argument that actually is historically correct.

I don't care about crack dealers selling on the streets as an analogy. I think it is a false analogy. I think what we saw here was one of the most remarkable, if not distressing, episodes of my professional career. You had institutions and individuals who decided collectively, repeatedly, and over a period of years to push the edge of that tax envelope as far as they possibly could and then try to push it further. Is Ms. Guerin to be punished for what she did? Of course. Is Ms. Guerin the kind of person without whom this never would have happened? Not even close.

Judge, I don't know if you saw it, but when I sent a letter to Ms. Jones, the probation officer, I included a memorandum that issued out of Jenkins & Gilchrist. If the

1 Court hasn't seen it, I hope the Court will indulge me to read
2 just one paragraph from this memorandum.

3 Your Honor, this was a memorandum that came from the
4 executive committee at Jenkins & Gilchrist at the end of 2000.
5 It was sent to all of the lawyers, or at least all of the
6 shareholders, at the time that compensation and bonus decisions
7 were being made. So this was not just a lawyer at Jenkins,
8 this was the structural ownership of Jenkins.

9 THE COURT: What is the date of this?

10 MR. ROTERT: Your Honor, this is dated December 29,
11 2000. This is directed all shareholders from the board of
12 directors. I'll happily hand this up to the Court.

13 THE COURT: It's not necessary. I just wanted to know
14 the context.

15 MR. ROTERT: This is the context, Judge, just at about
16 the time that the short options strategy is coming into
17 currency.

18 After two paragraphs talking about revenue and
19 productivity and things that law firms like to put in, the
20 following paragraph appears. It was sent to all of the lawyers
21 at Jenkins & Gilchrist. It reads:

22 "Special appreciation, of course, to the singularly
23 spectacular contributions of Paul Daugerdas and Erwin Mayer to
24 our 2000 results, supported principally throughout the year
25 with the invaluable efforts of Donna Guerin, Bryan Lee, and

1 Mike Cook."

2 These lawyers, these directors of the firm, could not
3 gush enough about the wonderful things that were being done by
4 Mr. Daugerdas and Mr. Mayer as supported by Ms. Guerin. The
5 other two lawyers named as the supporters of Mr. Daugerdas and
6 Mr. Mayer, one of them was Mike Cook, about whom I wrote in my
7 submission, who was the chairman of the tax department, who
8 signed innumerable opinion approval forms, who participated in
9 the development of opinion letters on an annual basis.

10 Another one of those lawyers was Bryan Lee, a young
11 man who also was very intellectually gifted and very talented
12 and who engaged in these tax shelter practices, along with
13 Patrick O'Daniel, a former Supreme Court clerk, and along with
14 Andreas Kontrimus, a Houston-based partner who had the fortune
15 to bring Michael Hammer into a HOMER deal.

16 I need to help, if I can, place Donna into the context
17 and the situation and the milieu of her times. She wasn't
18 leading the tax practice, but she was being swept along on this
19 current of enthusiasm that was surrounding it. She was
20 lionized. She was made a hero, made to feel like a wonderful
21 person by the shareholders, including shareholders whose
22 primary area of practice was taxation.

23 And they were competitive, because they weren't the
24 only firm that was doing this kind of thing. Other firms in
25 Texas, firms that we could see their buildings looking out the

1 window of this courtroom, were also involved in this
2 enterprise. KPMG was involved in this. Ernst & Young was
3 involved in this. Deloitte was involved in this. Deutsche
4 Bank was involved in this. Banks all over the place were
5 involved in this. Bank One.

6 Does that mean that what she did isn't wrong? Heavens
7 no. She came in and pled guilty, Judge. Does that mean that
8 she took a leading role, that these were her ideas? There is
9 no proof of that. Did she implement these things? Did she do
10 the paperwork? She did. She did. We don't dispute that.

11 Judge, when we talk about what is sufficient but not
12 greater than necessary, we have to balance that not only
13 against the conduct of others but against the life of this
14 person. I don't know how the Court feels about letters. I
15 know that in some instances they can be burdensome. I hope, I
16 pray, that in this case they were illuminating.

17 Judge, it is an irony of my life that nine years ago
18 today I was introduced to Donna Guerin for the first time. I
19 don't mean to offend the Court, but I must tell you that in
20 that period of time I have never seen a venal or a selfish or a
21 hostile word or thought come out of her. In that period of
22 time I have seen her show compassion and generosity. I have
23 seen her show love and sorrow. The day that the verdict came
24 down in this case, if people saw us walking together, I'm not
25 sure that they would have been able to divine which of us had

1 actually just gotten that verdict.

2 The dignity, the faith, the approach to how you deal
3 with other people in this person is worth saving. It is worth
4 taking into account. It is an important part of the
5 characteristics of this person.

6 Your Honor, I want you to, if you will bear with me,
7 let me talk a little bit about the other sentences in the other
8 cases. Mr. Okula has been nice enough to give us a chart that
9 contains all sorts of results in all sorts of other cases. We
10 have all been around this system long enough, Judge, to know
11 about the debates on consistency in sentencing or disparity in
12 sentencing. But I must tell you, Judge, I don't know that I
13 have ever seen a case that is quite like this.

14 Here we don't just have all of those people that have
15 committed tax fraud, because tax fraud began roughly the time
16 the Internal Revenue Code was implemented, and I dare say that
17 it is going to continue through our lives. I'd like to be more
18 optimistic about it, your Honor, but to the extent that the
19 Court is skeptical, I have a bit of that myself.

20 Your Honor, the point is that in one particular
21 instance we had this phenomenon, this tax shelter marketplace,
22 and the government, for reasons that are legitimate, isolated
23 this cell at KPMG, and they isolated this cell at Ernst &
24 Young, and they isolated this cell at Jenkins, but in a very
25 functional and logical way, those are all part of the same

1 case. They were all doing the same thing.

2 They were all coming up with these theories, these
3 labyrinthine ideas about how to get just to the edge of that
4 tax envelope and maybe just a little bit further, and they were
5 all turning a blind eye to the realities of what the clients
6 were doing.

7 If Ms. Guerin is to be convicted, as she is, so must
8 many others, as they have been. And if Ms. Guerin is to be
9 punished, as she will be, it is only just that she be evaluated
10 for punishment against the backdrop of what happened in those
11 other cases.

12 This isn't just a matter of the dollar amount here was
13 this and so therefore we find a dollar amount that is similar.
14 This is a very specific and unique chapter of history. It is a
15 very particular and individualized course of conduct in which
16 many engaged.

17 There is a man out of Chicago named John Ohle who
18 marketed HOMER tax shelters. His clients were some of the
19 people that enjoyed the stay with us in New York during the
20 trial. Mr. Ohle not only engaged in all of the conduct in
21 which Ms. Guerin engaged, only more, he also lied to his own
22 employers and stole money from people that trusted him. Mr.
23 Ohle was a difficult individual. In this building he was
24 convicted on felony charges because of that behavior.

25 The trial prosecutor, of course, was my colleague, a

man whom I respect, Mr. Okula. Mr. Okula, for reasons I fully understand, suggested that Mr. Ohle should receive the maximum sentence. But he didn't. He got 60 months. He got 60 months. I can't look into the mind of the judge who sentenced him except to know that that judge put 3553(a) down in front of him and made a determination to the best of his ability.

Judge, I cannot believe that my colleague Mr. Okula would argue to you that Ms. Guerin is qualitatively or quantitatively a worse person than Mr. Ohle. The people in the Ernst & Young cases were lawyers. The people in the KPMG case were lawyers. Mr. Ohle was a lawyer. The circumstances that may give the Court cause to be upset with Ms. Guerin's conduct were also present in those other cases.

I submit to the Court that as a matter of statutory mandate, but even more importantly as a matter of the Court's own notions of fairness and conscience, we must not say through a sentence that Ms. Guerin should be susceptible to more punishment than those people in those other cases whose conduct, if distinguishable, is distinguishable only because it was worse.

Every defendant who comes to the court is sorry to be there for sentencing. All sentences are solemn and unhappy events. But, Judge, in this case and for this woman, this entire series of events, now at least nine years in the making, have absolutely ruined her life.

1 The most important things that I am taught a person
2 can have in their heart are faith, hope, and charity. I know
3 from Donna that she still has faith, and I know from her
4 conduct that she still has charity, but I'm anxious about the
5 hope piece, Judge. I implore the Court to fashion a sentence
6 that doesn't extinguish that hope, that gives her some hope,
7 some opportunity that there can be another chapter in her life,
8 a good chapter that brings out the best of what she has to
9 offer.

10 Your Honor, sufficient is the easy part of your job
11 today. The not greater than necessary part is difficult. But
12 I do encourage the Court, I do advocate to the Court, I do
13 implore the Court that it is not necessary to send Donna Guerin
14 away for as long as the government asks, that it is not going
15 to make this country safer, it is not going to make taxes get
16 paid more faithfully. The deterrence of what happened here has
17 been writ large before we ever came to town today.

18 The sentencing standards that you have to apply under
19 the statute, in my judgment and I hope in the Court's, all
20 point to a sentence that balances just punishment with
21 compassion and an appreciation that this is not a bad person.
22 This is a woman, a fundamentally good and decent person, who
23 got put into and allowed herself to get swept along by those
24 who were praised for their spectacular contributions.

25 I know about the moral compass. But when you are

standing there and everybody around you is insisting to you that south is north, it's a little harder. She made mistakes. She's going to pay for those mistakes. We have already had a restitutionary order imposed that is going to follow her now for the rest of her life. I hope that the Court will find it possible and just to give her as much of that life as it can.

Thank you, Judge.

THE COURT: Thank you, Mr. Rotert.

Mr. Okula, does the government wish to be heard?

MR. OKULA: Briefly, your Honor.

I used the word "briefly, your Honor, because we are in the unusual setting of the Court having presided over a lengthy trial that involved witnesses and documents that demonstrated a truly unprecedented fraud. Judge, we have used a number of adjectives that have described this case and the losses that stemmed from it as unprecedented or gargantuan. This is truly the case that involves the largest attempted loss and actual losses suffered by the IRS in a criminal tax setting: \$7 billion of fraudulent tax losses or benefits, \$1.5 billion of guidelines loss, and hundreds of millions of dollars of actual loss.

Having been involved in this case and used those numbers for quite a while, it's sometimes easy to forget that the additional zeros that are involved in this case, your Honor, the mammoth loss that was involved through sustained

activity over years and years and years has got to be a factor that the Court considers when fashioning sentence.

Numbers take us only so far, I recognize that, your Honor. But it is not without significance that the tax loss in this case is four times greater than the maximum amount even covered by the tax table. The tax table maxes out at \$400 million. Everything above that is given the same amount. Shouldn't it be significant that the loss is four times greater than the maximum? I think unquestionably the answer to that is yes.

It is also important, your Honor, and I want to focus in on a couple of specific facts I think that speak volumes about Ms. Guerin's conduct in this case. Mr. Rotert used some very interesting phrases, like "culture of enthusiasm" about the tax shelters. It was really a culture of corruption, a culture of corruption that many people, your Honor, who were introduced to these things stood up and said no, not me. But that didn't involve Donna Guerin. She was swept up on it and she knowingly engaged in it.

Another fact or another set of phrases Mr. Rotert used was going right up to the line and deciding to edge over that line. Well, Judge, she didn't just edge over the line with respect to the backdating of the transactions. That is accountancy and law 101. You cannot backdate transactions to change those transactions after the year end. Ms. Guerin

engaged in that a number of times.

What that means, your Honor, is that unlike what Mr. Rotert was suggesting, where it was swept up and people who were just easing over the line and engaging in criminal activity, there was a species or subset of activity that was so flagrantly and so knowingly wrong that any first-year law student would know it, and she engaged in that.

One thing remarkable about that is the ease and the matter of factness with which it was carried out. Your Honor saw the evidence. Ms. Guerin faxes over to David Parse that little note where David Parse's secretary said, here's what I sent in order to effectuate the losses that the taxpayer wants and here's what should have been sent, suggesting to them in January of that year change it and we'll backdate the transactions.

They didn't even have to use code words or hide words. It was just a matter of fact about how they were going about it. I think that warrants consideration, your Honor, and the fact that this is something wholly different from the sort of pushing the envelope type of crime that Mr. Rotert was suggesting.

One additional thing I want to focus on, your Honor, and I think the Court might recall this because no matter how long the case is, it has a couple of small nuggets with respect to each defendant that remains so vivid and that is so telling

and that suggests so much about the culpability of the person that it warrants mention.

The one that I want to point out is the meeting in early 2000 that Erwin Mayer testified about. It is subject to certain notes that were taken by a junior J&G associate. It occurred in Chicago when Ms. Guerin and Mr. Mayer had called up a number of Texas-based J&G associates to get a tutorial from Donna Guerin about how these tax shelters worked and how they were going to prepare the tax returns.

There was the one note that was encaptured in the note-taking of one of those associates that captured what Ms. Guerin said during that meeting. When describing why they inserted the limited liability company, the LLC, into the short sale and short option tax shelter, she said, and it is a virtual quote, it was part of the hide-the-ball strategy of this tax shelter. Imagine that. She's talking in a matter-of-fact way to a group of junior associates that it's part of a hide-the-ball strategy with respect to hiding the ball from the IRS, not to give it transparency so it will be audited.

What is occurring at that meeting? There are junior associates at Jenkins & Gilchrist who are being tutored by Ms. Guerin about this criminal activity. That is precisely why she was given a supervisory role in this, your Honor. So it is important to keep in mind that, yes, we are not saying she is Paul Daugerdas, Paul Daugerdas was the mastermind, the

1 architect of the fraudulent strategies that led to most of
2 these shelters, she is not Paul Daugerdas, but she was a leader
3 who dragged other people in and supervised those junior people
4 and was responsible for some of those junior people also losing
5 their moral compasses and engaging in criminal activity, people
6 like Bryan Lee and Patrick O'Daniel and the other junior
7 associates at the firm. It is important, your Honor, to keep
8 that in mind.

9 The main point I want to make before I sit down, your
10 Honor, is we can't quarrel with Mr. Rotert's argument that it
11 is unlikely from a specific deterrence standpoint that you are
12 going to see Donna Guerin in a courtroom again. But, your
13 Honor, the sentence that you impose in this case is so vitally
14 important, and I can't stress it enough, from a general
15 deterrence standpoint that a meaningful sentence is, in a word,
16 essential.

17 Since I'm a little bit of a dinosaur in the U.S.
18 Attorney's office and spend most of my time doing criminal tax
19 cases, I like to think about tax policy and the similar issues,
20 and I have. In comparing the relative tax compliance in the
21 United States with other countries, what makes I think it
22 remarkable about the United States is that we do have a
23 relative high degree of tax compliance. There are many
24 European countries, South American countries where tax evasion
25 is really a sport that so many more engage in.

1 In order, your Honor, to convey the message to people,
2 and I think it is a reason why we have a generally high tax
3 compliance here, is that there has to be the real understanding
4 that there are serious consequences and not slaps on the wrist
5 for engaging in criminal activity. When you have systemic,
6 years-long, leadership-driven criminal activity that causes
7 unprecedented, truly unprecedented amounts of loss to the IRS,
8 the message has to be sent that there are serious consequences.

9 Your Honor, I go before judges in this court all the
10 time. There are cases when we go into the sentencing and we do
11 not quarrel with the fact that a below-guidelines sentence
12 might be appropriate given the factors. And there are cases,
13 your Honor, of which this is one, where it is essential to
14 figuratively pound on the table to say that an important
15 message needs to be sent.

16 The losses that are involved in this case are well
17 known. The repercussions for somebody who knowingly and
18 systemically got involved in the conduct and enjoyed the
19 multimillion-dollar benefits from that conduct, the sentence
20 stemming from that activity has to be well known and it has to
21 be an important one for deterrence purposes.

22 Thank you, your Honor.

23 THE COURT: Before you sit down, Mr. Okula, would you
24 respond to Mr. Rotert's argument concerning Mr. Ohle.

25 MR. OKULA: I would be happy to, your Honor. I give

1 credit to my co-counsel, who actually wrote me a note to make
2 sure to speak about that, and of course I dropped the ball and
3 did not. But I would be happy to answer that, your Honor.

4 Comparisons are important, and I think that there are
5 several significant differences between Mr. Ohle's case and Ms.
6 Guerin's. The tax loss involved from Ohle's conduct was
7 \$110 million. The loss involved from Donna Guerin's conduct,
8 which spanned four fraudulent tax shelters -- Mr. Ohle's
9 involved one, actually two. Principally, there was a
10 \$110 million or so from the fraudulent HOMER tax shelter, which
11 was part of our case.

12 Mr. Ohle also involved himself and two close friends
13 in a different tax shelter with respect to their personal
14 activities. He didn't really sell it. It wasn't part of the
15 loss that was involved significantly in his sentence.
16 Essentially, his sentence was based on one shelter plus the
17 personal use of another. That's one important difference.

18 The time period between Mr. Ohle and Ms. Guerin is
19 significantly different. Mr. Ohle's activity was about 2 years
20 in duration and involved, like I said, principally the one
21 shelter. Ms. Guerin's activity involved 6, 7, 8 years worth of
22 activities and the 4 separate shelters.

23 Yes, I concede readily that the tax shelter fraud as
24 well as Mr. Ohle's defrauding of his employer Bank One was
25 involved. But I suggest to you, your Honor, the loss for the

1 Bank One activities was fully captured in the overall tax loss.

2 The bottom line is, your Honor, there is a significant
3 difference in the duration of the criminal activity and the
4 amount of the tax loss that was involved. Mr. Ohle was
5 convicted of three counts. His guidelines at the end of the
6 day, because of various leadership adjustments and the like,
7 were 360 months to life.

8 Judge Rakoff, notwithstanding the fact that we argued
9 that a 15-year sentence, or less than half the applicable
10 guidelines, was appropriate, decided that 60 months was the
11 appropriate sentence. We think he was wrong. We respectfully
12 take issue with the approach that Judge Rakoff took. But that
13 was the sentence that he imposed.

14 Are there any other questions, your Honor?

15 THE COURT: No. Thank you, Mr. Okula.

16 Mr. Rotert, does your client wish to address the Court
17 before sentence is imposed?

18 MR. ROTERT: She does, your Honor.

19 THE COURT: I'll hear from Ms. Guerin at this time.

20 THE DEFENDANT: May I remain seated, your Honor?

21 THE COURT: Yes. Pull the microphone over to you.

22 THE DEFENDANT: Thank you.

23 I'm here awaiting your sentence as a defeated person
24 in many ways. I worked extremely hard to get through college
25 and law school and to achieve success at a law firm. Despite

those years of study and sacrifice, I never wanted to necessarily be a famous attorney, certainly not an infamous one. In any event, my legal career is gone and has been gone for a long time now.

Besides wanting to be a lawyer, my other main dream in life was to be a mother. Unfortunately, I wasn't able to physically bear children, and my hope to adopt is also now gone, along with my husband's hope to be a father and my mother's hope to be a grandmother. The pain of that realization is nearly indescribable and makes any other sentence this Court finds appropriate pale in comparison.

Further, my actions have resulted in the loss of the house my husband and I had made our home from the time that we were married and into which we, and especially my husband, had put so much work. Quite frankly, I am at a point where there is simply not joy in anything.

I regret and am truly sorry for my actions which have brought me to this point. In particular, I regret my reliance on so many other accountants, attorneys, and financial advisers whom I had depended upon to describe to our mutual clients requirements I believed necessary for the tax strategies at issue to pass muster. I regret not taking time and effort with those clients to further verify their intents. I also regret not having the clients with whom I did have such conversations acknowledge them in writing.

1 I regret not further challenging certain positions
2 taken by my colleagues, including attorneys who were my
3 superiors, as well as others with whom I worked closely and
4 trusted but who apparently failed to be truthful with me for
5 many years.

6 I regret not better handling or further documenting
7 the circumstances surrounding my January 2001 submission to
8 Deutsche Bank of a document which changed the recipients of
9 assets in a partnership liquidation after the incorrect
10 document had been submitted the prior December, especially
11 considering that that revision actually decreased the potential
12 tax benefits for two of the three individuals who participated
13 in that transaction. I do maintain that that was the only one
14 of the so-called backdating transactions that I had anything to
15 do with.

16 I am sincerely grateful for the support of my family
17 and my friends over the past decade, since the beginning of the
18 investigation into Jenkins & Gilchrist's tax practice, and for
19 those persons' belief in me. I am sorry for disappointing any
20 or all of them, and particularly for whatever pain I have
21 caused to my husband and to my mother.

22 I continue to pray for God's forgiveness and his
23 strength to see me through this ordeal. I beg you, Judge
24 Pauley, for your mercy and compassion in rendering the sentence
25 you are about to render. Thank you.

1 THE COURT: The defendant, Donna M. Guerin, comes
2 before this Court having pled guilty to two serious crimes
3 against the United States, conspiracy to defraud the United
4 States, commit tax evasion, and engage in wire fraud, and one
5 substantive count of tax evasion. Her plea followed a very
6 lengthy trial before this Court with which all the parties are
7 familiar.

8 This Court has reviewed the pre-sentence investigation
9 report and as amended on the record here today. I adopt the
10 findings of fact in the report as my own.

11 Turning to the guidelines calculation, because the
12 loss amount here was more than \$400 million, the base offense
13 level is 38. Because the defendant, Ms. Guerin, was engaged in
14 encouraging co-conspirators to violate the tax laws, a further
15 2-level enhancement is warranted under 2T1.9(b)(2).

16 A further adjustment of 3 levels is warranted for Ms.
17 Guerin's role in the offense in supervising associate attorneys
18 at the Jenkins & Gilchrist law firm and providing tutorials.
19 As such, she was a manager and supervisor of activity involving
20 5 or more persons. So her adjusted offense level is 43.

21 Back on September 13th Ms. Guerin pled guilty before
22 this Court. She at that time accepted responsibility for her
23 criminal conduct. Accordingly, I grant her a 3-level
24 reduction. So, her total offense level is 40.

25 The defendant's criminal history category is a I.

1 That would yield a guideline range of 292 to 365 months. But
2 each of the crimes to which Ms. Guerin pled guilty has a
3 maximum term of 5 years on each count.

4 As this Court noted in its decision granting a new
5 trial, the sanctity of an oath is central to the sound
6 administration of justice. We are a nation of laws, and
7 lawyers are entrusted with great responsibility to ensure that
8 the laws are faithfully discharged. When an attorney violates
9 her oath to uphold the law, she undermines our entire system of
10 justice.

11 This tax shelter fraud conspiracy was breathtaking in
12 its scope and in the damage it caused the nation, nearly \$8
13 billion in fraudulent tax benefit claims and more than \$1.5
14 billion in lost tax revenue to the United States. It corrupted
15 numerous professionals, including attorneys, accountants, and
16 financial advisers. It involved some of our largest financial
17 accounting and legal firms, including Deutsch Bank, BDO
18 Seidman, and Jenkins & Gilchrist.

19 Because of the complexity of the scheme, its success
20 relied on the unethical and criminal behavior of highly
21 educated, highly compensated professionals, like Ms. Guerin.
22 Lawyers and accountants became willing tools for the ultra-
23 wealthy to avoid paying their fair share of taxes, and these
24 professionals flagrantly violated their oaths in order to line
25 their pockets.

1 In the end, this case is all about greed. Ms. Guerin
2 played a central role in the conspiracy. She was not a
3 mindless automaton who unthinkingly committed crimes on
4 Daugerdas's behalf, nor did she commit these crimes because of
5 any cult of personality. She became a criminal for two
6 reasons: The lure of money and the belief that she'd never be
7 brought to justice. She accumulated more than \$18 million in
8 the process.

9 Navigating clients lawfully through her area of
10 expertise, the tax code, she facilitated their breach of the
11 laws. For example, Ms. Guerin sold John Martin a tax shelter
12 transaction so he could avoid paying taxes on gains he received
13 from selling his computer software company. Although he was
14 sold one tax shelter, he actually entered into a different tax
15 shelter, and then Ms. Guerin issued him an opinion letter and
16 other paperwork falsely describing Martin's knowledge of the
17 transaction. Martin did not participate in the government's
18 amnesty program, instead choosing to play the odds that he
19 could file fraudulent returns and escape audit. But the
20 government did audit him, and in court's view he was lucky not
21 to be indicted.

22 Ms. Guerin was also instrumental in backdating
23 transactions, which required her to violate her fundamental
24 obligations as a tax lawyer and a CPA. Sadly, she trained
25 other, younger attorneys who may have looked up to her as a

1 role model to follow in her footsteps and participate in a vast
2 fraudulent scheme, including showing them how to "hide the
3 ball" through the creation of LLCs.

4 Ms. Guerin argues that this investigation and
5 prosecution have exacted a considerable toll on her: The loss
6 of her law license, her reputation, and her home. That is
7 certainly true. But she more than anyone knew the risks. She
8 knew that when she committed these crimes. She knew her law
9 license could be revoked. She knew that her reputation would
10 be ruined and she could risk losing all her ill-gotten gains.
11 Back in the heady days when she was collecting millions of
12 dollars through this scheme, she funded a trust in her
13 husband's name, undoubtedly as a hedge against the possibility
14 that the government might someday bring her to the bar of
15 justice.

16 Ms. Guerin complains about the costs associated with
17 defending against this indictment. She states that she was
18 required to engage counsel early in 2004, when the Department
19 of Justice first began investigating the tax shelter
20 marketplace, and she's paid significant legal fees for nearly a
21 decade, including the very costly process of defending a
22 lengthy criminal case far from home. That's a quote from her
23 memorandum.

24 She laments the fact that she had to sell her large
25 home in Illinois and move into a four-bedroom three-bath home

1 in Scottsdale, Arizona, that she describes as "modest." Most
2 poignantly to this Court, she also argues that with this
3 conviction she will be unable to adopt a child and enjoy the
4 blessings of raising a family.

5 But she alone controlled her fate. When the
6 government first began to investigate this matter, she could
7 have answered their questions forthrightly. But instead of
8 honestly responding, she lied to the government, engaged in a
9 pattern of deception. She could have avoided her costs by
10 admitting her guilt. So, the financial costs associated with
11 this entire exercise should be shouldered by her.

12 At least she has finally come to terms by taking
13 responsibility for her criminal conduct.

14 Ms. Guerin argues in her brief that this Court should
15 "consider those who avidly pursued tax shelter business or who
16 willingly entered tax shelters but who were not charged with
17 any crime" and "that she was brought to the justice system even
18 as many others escaped that outcome." But those assertions
19 underscore the importance of general deterrence for tax shelter
20 fraud.

21 Ms. Guerin, like others involved in this conspiracy,
22 could have assisted the government in its investigation.
23 Instead, she hindered the government. While many taxpayers may
24 have escaped criminal liability, they, too, are paying a price:
25 Taxes, penalties, attorney's fees, and the threat of criminal

prosecution. For many of the individuals she refers to, though, their gambit may have paid off because Ms. Guerin and others facilitated their crimes.

At bottom, Ms. Guerin's arguments underscore the strong need for a significant sentence. Looking at the 3553(a) factors, the crimes here are very serious and there is a compelling need for general deterrence and a need for specific deterrence.

Ms. Guerin's childhood began in modest circumstances. Her mother and grandmother sacrificed everything for her. Her grandmother retired from her factory job, moved into their bungalow, and helped raise her. Her mother worked in an administrative job to make ends meet. They did everything for her.

Guerin's trajectory through childhood, college, law school, graduate school, and on to a law firm can fairly be characterized as the embodiment of the American dream. She excelled at school, went to college on a scholarship, became a CPA and a lawyer.

But then her lust for money -- and that is the only way I can describe it, her lust for money -- turned her American dream into a nightmare. Apparently, earning a couple of hundred thousand dollars a year in Chicago was not enough for Ms. Guerin as a young lawyer in her 30s. She had to have more. Not just an incremental increase in compensation or a

bonus, but a quantum leap of millions more. In the year 2000, the year she turned 40, she earned \$11,540,795. But it was all fraud, and she knew it.

As stunning as her multimillion-dollar compensation was, it apparently wasn't even enough. She had an agreement with her co-defendant Daugerdas to get a little more even if it meant defrauding her law partners. It's the modern day equivalent of Hawthorne's version of the story of Midas. Everything she touched turned to gold with tragic consequences. Looking at Ms. Guerin, her fall has been Faustian.

While her family offers touching vignettes about her in their letters, they are not much different from what this Court sees from many defendants who are far less educated and well off. Her mother writes that she is "very afraid that she's going to need Donna's help and she won't be there for me." But Ms. Guerin forfeited the right to be by her mother's side because of her greed.

For Ms. Guerin, it apparently has always been about the money. Even with all the money she amassed, there's not a single letter submitted to the Court on her behalf showing any meaningful commitment to public service or charity beyond her college sorority that encompassed activities like driving an elderly alumna to a reunion celebration.

Then, there is the letter from Barry Nekritz, a law partner at SNR Denton, who was a tax shelter client of Ms.

1 Guerin's. The government reports that Ms. Guerin engineered a
2 tax shelter for Mr. Nekritz that generated \$600,000 in
3 fraudulent losses on his own tax returns.

4 It's no wonder that Mr. Nekritz writes of Ms. Guerin,
5 and I quote, "She knew the law and never varied from it," "She
6 always displayed the utmost in ethical conduct," and "If you
7 have a secret but want to get it off your chest, you can tell
8 it to Donna, knowing it will never go further. I would trust
9 her with anything as her integrity in my opinion is beyond
10 reproach." Spoken like a true co-conspirator. Of course, only
11 the government knows why Mr. Nekritz wasn't prosecuted, but his
12 letter sets a new high watermark for chutzpah before this
13 Court.

14 In short, there are very few mitigating circumstances
15 here, just unchecked avarice. It is against that backdrop that
16 the Court is prepared to impose sentence on Ms. Guerin at this
17 time. I'd ask her to stand.

18 Ms. Guerin, in my remarks to you I've tried to make
19 clear what I have gathered from so many weeks of trial and so
20 much time spent on this case. You had everything and you
21 squandered it. You must be punished.

22 It is my judgment that you be sentenced to a term of
23 96 months of imprisonment, to consist of 60 months with respect
24 to Count One and 60 months on Count Two, of which 36 are to run
25 consecutive to the term of imprisonment on Count One. I am

1 also imposing a 3-year term of supervised release on you, to
2 run concurrently on both counts. The order of forfeiture in
3 the amount of 1,600,000 has been imposed. I am imposing the
4 mandatory special assessment of \$200. I am not imposing any
5 fine in this case, because that would be an exercise in
6 futility.

7 I am imposing all of the standard conditions of
8 supervised release and the following special conditions: That
9 you will provide your probation officer with access to any
10 requested financial information; that you will not incur new
11 credit card charges or open additional lines of credit without
12 the approval of your probation officer unless you are in
13 compliance with your installment payment schedule.

14 I am fixing an installment payment schedule that you
15 are to pay 20 percent of your gross income upon your release
16 toward the amount of restitution that I have ordered. I am
17 also going to require you to make a \$200,000 payment toward
18 restitution prior to the time that you begin to serve your
19 sentence. You have moneys to be able to do that, in this
20 Court's view, so it will be done.

21 This constitutes the sentence of this Court, Ms.
22 Guerin.

23 I advise you that to the extent you have not
24 previously waived your right to appeal, you have the right to
25 appeal. I advise you further that if you cannot afford

1 counsel, counsel will be provided to you free of charge. Mr.
2 Rotert has done an admirable job in representing you throughout
3 the proceedings before me. I am confident that he will advise
4 you further with respect to your rights.

5 You may be seated.

6 Are there any further applications?

7 MR. OKULA: Yes, your Honor. We respectfully move to
8 dismiss the outstanding counts in S3 against Ms. Guerin.

9 THE COURT: The government's application is granted.

10 MR. OKULA: We also have no opposition to a voluntary
11 surrender upon either a date set by the Court or upon
12 designation by the Bureau of Prisons.

13 THE COURT: Mr. Rotert?

14 MR. ROTERT: Your Honor, I respectfully ask the Court
15 to assign a surrender date of Tuesday, May 14th, for Ms.
16 Guerin.

17 THE COURT: I will do so.

18 MR. ROTERT: I know that from one of the transcripts
19 that was provided to me, it isn't the Court's usual practice,
20 but I am going to respectfully request it. There is a women's
21 correctional facility very near to where Ms. Guerin currently
22 resides. It's called SPC Phoenix. I'd be grateful if the
23 Court would recommend it to the BOP. I know that no one knows
24 how effective, but it would be helpful if your Honor would
25 recommend that.

1 THE COURT: I am going to recommend that specific
2 facility in Ms. Guerin's case provided that the Bureau of
3 Prisons believes that it conforms with her security
4 classification.

5 MR. ROTERT: Your Honor, I'm going to respectfully
6 request that the Court reconsider the \$200,000 restitutionary
7 payment obligation before she begins serving. I ask the Court
8 to reconsider that in light of the corrections that the Court
9 has accepted to the pre-sentence report. I do believe that
10 that is going to require her to cash IRAs and to take some very
11 difficult -- I'm not even confident that she will be able to at
12 that level, but I would respectfully ask the Court to
13 reconsider that, so I so move.

14 THE COURT: Does the government wish to be heard with
15 respect to that application?

16 MR. OKULA: Your Honor, we don't think that the
17 direction that your Honor gave was inappropriate, and we leave
18 it at that.

19 THE COURT: I am going to decline your application to
20 reconsider that, Mr. Rotert. I remain convinced that she will
21 find a way. Earlier, among other things, you told me about all
22 the art they acquired, and they still have art.

23 MR. ROTERT: It's been liquidated.

24 THE COURT: There's \$80,000 of art listed on Mr.
25 Guerin's --

1 MR. ROTERT: They have been trying to sell it, Judge.
2 They can't find a buyer for it. They have been trying to sell
3 it for the last several years. Your Honor, I appreciate that
4 the Court's feelings are very clear and I respect and don't
5 mean to be difficult. We got to this 1.6 million number and
6 the restitution on top of that, I appreciate. But that was a
7 number that we worked through after laying everything open to
8 the government. \$200,000 is --

9 THE COURT: I know you laid everything open to the
10 government. But the government itself acknowledged earlier
11 that despite their investigative efforts, despite their grand
12 jury subpoenas addressed to the trust, they weren't able to
13 find where things went. I end where I began with my duty to be
14 skeptical of a fraudster of this magnitude. I'm confident that
15 Ms. Guerin will find a way.

16 This matter is concluded.

17 (Adjourned)

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